No. 35384-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas Barton,

Appellant.

Ferry County Superior Court Cause No. 17-1-00012-4

The Honorable Judge Jessica T. Reeves

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Thomas Barton was homeless in the spring of 2017. RP 201-216. His cousin had gone missing, and Mr. Barton and others had been searching for him near Keller in Ferry county. RP 123, 187. Mr. Barton had slipped in the mud and became dirty and wet. RP 191. He borrowed dry clothes to change into from a friend and put his coveralls back on over them since it was cold. RP 125-126, 192, 226.

Mr. Barton had run out of gas and was siphoning gas from his friend's vehicle into his own, so they could meet up with the rest of the search group. RP 134, 188, 190. When he saw a police officer, Mr. Barton's impulse was to run; he'd been in trouble before. RP 84, 193-194.

Deputy Rainer gave chase, Mr. Barton fell, and Deputy Rainer tazed him. RP 88-89, 195. Once in cuffs and at the police car, Deputy Rainer searched Mr. Barton. RP 94-102. In the outer overalls, Rainer found the knife Mr. Barton told him was there, as well as another one and a marijuana pipe. RP 94-95, 130-131, 136, 200-201. Mr. Barton said these items were his. RP 94-95, 200-201. In the shorts Mr. Barton wore underneath, the officer found a methamphetamine pipe. RP 102, 136. Mr.

Barton said that was his friend's, who had loaned him the dry clothes.[1] RP 192, 202, 203.

The State charged Mr. Barton with possession of methamphetamine based on the residue in the pipe. CP 6. The contents of the pipe were so negligible as to be unweighable, according to the State's expert. RP 147-150, 161-163.

Mr. Barton admitted to the jury that he ran from the officer who was trying to make a lawful arrest. RP 205. He agreed that he had obstructed the officer but said that once he fell he did not resist arrest. RP 205. He argued he'd possessed the methamphetamine pipe unwittingly. RP 205; CP 28.

The court instructed the jury, without defense objection, using the court's standard reasonable doubt instruction. RP 233; CP 17. That instruction included the following: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 17.

The jury convicted Mr. Barton as charged. RP 289-290. Prior to trial, Mr. Barton's attorney agreed that Mr. Barton had been convicted of

[1] During closing argument, the State argued that all of the items were in the same pocket, but the officer's testimony was that the methamphetamine pipe was found in the inner shorts pocket and the other items were in the outer overalls. RP 94-102, 125-126, 136.

theft and bail jumping and forgery in 2015, eluding in 2000, and forgery in 1996.[2] RP 17-19. At sentencing, Mr. Barton's attorney agreed that he had 4 points.[3] RP 300. The court, without findings or comment, signed a Judgment and Sentence that listed convictions for theft 2 in 2015, forgery in 2015, bail jumping in 2015, and attempting to elude in 2000. CP 50; RP 299-313.

Mr. Barton timely appealed. CP 60-71.

ARGUMENT

I. RCW 69.50.4013 IS UNCONSTITUTIONAL WHEN APPLIED TO SIMPLE POSSESSION OF DRUG RESIDUE, BECAUSE IT CREATES FELONY LIABILITY WITHOUT PROOF OF ANY CULPABLE MENTAL STATE.

Mr. Barton was convicted of simple possession of drug residue. RP 147-150, 161-163; CP 45. In numerous jurisdictions, the prosecution would have been required to prove a culpable mental state. However, in Washington, felony liability attaches to simple possession of drug residue even where the accused person had no idea that residue was present. *See State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Instead, it falls to the defendant to prove ignorance of the miniscule amounts of contraband present in residue cases. *Id.*, at 380-381.

[2] This forgery stemmed from a juvenile charge. CP 50.

[3] The juvenile forgery conviction was apparently not counted. CP 50-51.

Washington's practice of imposing felony sanctions for simple possession of drug residue even absent evidence of any culpable mental state is inconsistent with a clear national consensus and evolving standards of decency. It also leads to unduly harsh results.

The lack of a *mens rea* element for felony drug possession in residue cases violates due process and the Eighth Amendment. This court must either recognize a non-statutory *mens rea* element or strike down the statute as unconstitutional.

A. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions on possession of drug residue without proof of a culpable mental state.

1. The Eighth Amendment prohibits punishment conflicting with the evolving standards of decency that mark the progress of a maturing society.

The Eighth Amendment categorically prohibits certain punishments. *Graham v. Florida*, 560 U.S. 48, 59-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010). Traditionally, this approach applied only in death penalty cases. *Id.*, at 60. In *Graham,* the Supreme Court expanded the categorical approach to juvenile cases that do not involve the death penalty. *Id.,* at 61.

To implement the Eighth Amendment, courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Graham,*

560 U.S. at 58. The *Graham* court adopted a two-step framework for the categorical approach.

First, a reviewing court considers objective indicia of society's standards—in the form of legislation and sentencing data— "to determine whether there is a national consensus against the sentencing practice." *Id.,* at 61. Second, the court considers "'standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose' …[to] determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.,* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945, 129 S. Ct. 1, 171 L. Ed. 2d 932 (2008).

In *Graham,* the court analyzed sentencing data and found it significant that "only 11 jurisdictions nationwide" imposed the challenged sentence (in that case, life without parole for juvenile nonhomicide offenders). *Id.,* at 64. The court characterized the practice as "exceedingly rare." *Id.,* at 67.

The reasoning set forth in *Graham* requires invalidation of RCW 69.50.4013 as applied to possession of drug residue, when that crime is committed without any culpable mental state.

2. There is a strong national consensus that possession of drug residue should not be punished as a felony absent proof of some culpable mental state.

The consequences of a felony conviction are much greater than those imposed for a gross misdemeanor. A class C felony may be punished by up to five years in prison and a fine of up to $10,000.[4] RCW 9A.20.021. Furthermore, a convicted felon loses certain civil rights, such as the right to vote, to sit on a jury, and to possess a gun, in addition to suffering "grave damage to his [or her] reputation." *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985).

There is a clear national consensus that mere possession of drug residue should not be punished as a felony absent a *mens rea* element. *See, e.g.*, D.C. Code Ann. § 48-904.01(d)(1) ("It is unlawful for any person *knowingly or intentionally* to possess a controlled substance…") (emphasis added); *Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (D. Conn. 2001) *modified*, 434 F. Supp. 2d 107 (D. Conn. 2006) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *People v. Rubacalba*, 6 Cal. 4th 62, 859 P.2d 708, 23 Cal. Rptr. 2d 628 (1993) (requiring proof of "usable quantity" and knowing possession); *Louisiana v. Joseph*, 32 So.3d 244 (2010) (statute requires proof that defendant "knowingly or intentionally" possessed a controlled substance); *Finn v. Kentucky*, 313

[4] This compares to a fine of $5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant's knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if State proves the elements of "awareness" and "conscious intent to possess"); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant's knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant's statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (State must be given an opportunity to prove knowing possession, even of a "miniscule" amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant "knowingly or purposely" obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting "usable quantity" rule, but noting that prosecution must prove knowledge); *Lord v. State*, 616 So.2d 1065 (Fla. Dist. Ct. App. 1993) (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony

conviction);*Garner v. Texas*, 848 S.W.2d 799, 801 (1993) ("When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance"); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a "measurable amount" of controlled substance, so long as knowledge is established); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony); *State v. Christian*, 795 N.W.2d 702, 705 (2011) (willful possession of residue—which includes intentional, knowing, or reckless possession—is a felony).[5]

This national consensus is considerably stronger than in *Graham. Graham*, 560 U.S. at 64. Thus, the analysis moves to the second phase. *Id.*, at 61. The court examines three factors in applying the second part of the *Graham* test: (1) "the culpability of the offenders at issue in light of their crimes and characteristics," (2) "the severity of the punishment," and "(3) whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67 (citations omitted).

These three factors support the national consensus outlined above. First, persons who unknowingly possess drug residue are relatively blameless. Second,

[5] *See* N.D.C.C. § 19-03.1-23(7); N.D.C.C. § 12.1-02-02.

a felony conviction, the associated punishments, and the additional consequences to reputation and civil rights are unduly harsh. Third, there are no legitimate penological goals for imposing felony liability on those who unknowingly possess drug residue.

Four commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 72. None of these four goals are served here.[6] A person who unwittingly possesses drug residue cannot be deterred from doing so in the future. If the statute's goal is to make people more careful, even a low-level mental state such as criminal negligence would serve that purpose; it is unnecessary to punish those whose mental state is wholly innocent.

Nor does it make sense to speak of retribution or incapacitation for a person who unwittingly possessed drug residue. Where possession is unwitting, the "offender" is neither deserving of punishment nor prevented (by imposition of felony sanctions) from causing future harm.

Finally, a person who unwittingly possessed drug residue cannot be rehabilitated. Rehabilitation presupposes a volitional act that can be treated in some manner. A person who did not even act negligently with respect to the fact

[6]Furthermore, any penological goals are adequately served by RCW 69.50.412(1), which criminalizes (*inter alia*) the use of drug paraphernalia to store or ingest a controlled substance. Indeed, most residue cases—including this one—could be prosecuted under RCW 69.50.412(1). Violation of the statute is a misdemeanor.

of possession (or the nature of the substance) will not respond to any form of treatment, because there is no ill to be addressed.

Under *Graham*, "the sentencing practice under consideration is cruel and unusual." *Id.*, at 74. The Eighth Amendment categorically prohibits punishing as a felony the possession of drug residue, without some proof of a culpable mental state. *Id.*

RCW 69.50.4013 violates the Eighth Amendment. *Id.* Mr. Barton's felony conviction must be vacated, and the felony charge dismissed with prejudice. *Id.*

B. RCW 69.50.4013 violates due process as applied to possession of drug residue absent proof of some culpable mental state.

The Fourteenth Amendment guarantees an accused person due process of law. U.S. Const. Amend. XIV. The legislature may create crimes with no *mens rea;* however, due process "admits only a narrow category of strict liability crimes, generally limited to regulatory measures where penalties are relatively small." *United States v. Macias*, 740 F.3d 96, 105 (2d Cir. 2014) (Raggi, J., concurring). There are constitutional limits on the kind of penalties that can be imposed for strict liability crimes: "[s]evere fines and jail time… warrant a state of mind requirement" for conviction. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n. 4 (10th Cir. 2010).[7]

[7] This is in keeping with the Supreme Court's prohibition on statutes that criminalize status crimes and acts which the defendant does not cause. *Apollo*, at 228 (citing *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) and *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

A statute imposing strict liability "does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125. If it were otherwise, "a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his [or her] reputation," a result that "the Constitution does not allow." *Id.; see also Louisiana v. Brown*, 389 So.2d 48, 51 (La. 1980) (invalidating as unconstitutional "the portion of the statute making it illegal 'unknowingly' to possess a Schedule IV substance").

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are "not inconsistent with the Constitution and statutes of this state…" RCW 9A.04.060. Washington courts have the power to recognize non-statutory elements of an offense.[8] *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is an essential nonstatutory element of robbery); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004) (identity of controlled substance is an essential element when it affects the penalty); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992) (Conspiracy to deliver

[8] In fact, the judiciary even has the power to define entire crimes. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to recognize affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

includes common-law element of "involvement of a third person outside the agreement.") Courts also have the power to add other facts required for conviction, when such facts are necessary to ensure the constitutionality of the statute. *See, e.g., State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013), *as amended* (Feb. 8, 2013) (First Amendment requires state to prove a "true threat" for harassment conviction, but "true threat" is not an element of the offense.)

Possession of a controlled substance is a strict liability offense. *State v. Denny*, 173 Wn. App. 805, 808-809, 294 P.3d 862 (2013). Current law allows conviction for unwitting possession of amounts so small as to be imperceptible to the naked eye. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) ("[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction."). Because of this, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who visits Washington from Florida would likely be guilty of cocaine possession upon arrival.[9] *See, e.g., Lord*, 616 So.2d at 1066 ("It has been established by toxicological testing that cocaine in South Florida is so pervasive that

[9]Such a person might assert the affirmative defense of unwitting possession. *Cleppe*, 96 Wn.2d at 381.

microscopic traces of the drug can be found on much of the currency circulating in the area.")

Washington's possession law violates due process. *Wulff*, 758 F.2d at 1125; *Brown*, 389 So.2d at 51. RCW 69.50.4013 imposes liability even when the accused cannot know she or he is in possession of a controlled substance without the aid of sensitive equipment. *See, Lord,* 616 So.2d at 1066.

The court should either invalidate the statute or employ its inherent and statutory common law authority to recognize a *mens rea* element for possession of a controlled substance.[10] *Goodman,* 150 Wn.2d 774*; Cleppe,* 96 Wn.2d 373*; Chavez,* 163 Wn.2d 262. A common law element requiring proof of a culpable mental state is not inconsistent with Washington's possession statute. RCW 69.50.4013.

The obligation to recognize a *mens rea* element does not conflict with *Cleppe* and its progeny. *Cleppe* concerned an issue of statutory interpretation; it did not address the requirements of the due process clause. *Cleppe,* 96 Wn.2d at 377-381. Furthermore, *Cleppe* and subsequent cases have been concerned only with proof of intent or guilty knowledge. *Id.* There do not appear to be any cases addressing lesser mental states such as negligence or recklessness.

[10] The Supreme Court has rejected a "usable quantity" test, but has never upheld a conviction based on possession of mere residue. *See State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on "a measurable amount" of Demerol.)

If the court recognizes a non-statutory element requiring proof of some culpable mental state, Mr. Barton's possession conviction would be based on insufficient evidence, given the State's failure to prove negligent, reckless, knowing, or intentional possession. A conviction based on insufficient evidence violates due process. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The remedy is dismissal with prejudice. *Id.*

The court should either recognize such an element or invalidate RCW 69.50.4013 as applied. In either case, the court must reverse Mr. Barton's possession conviction and dismiss the charge with prejudice. *Id.*

C. Division III should not follow Division II's decision in *Schmeling.*

Division II has erroneously rejected arguments similar to those raised here. *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015). Division III should not follow *Schmeling.*[11]

The *Schmeling* court refused to apply the categorical approach to adult drug offenders. *Id.*, at 800.[12] According to the *Schmeling* court,

[11] Relying on *Schmeling,* this court and Division I have addressed the issue in unpublished decisions. *State v. Muse,* 197 Wn. App. 1042 (2017) (Division III, unpublished); *State v. McBride*, 195 Wn. App. 1003 (2016) (Division III, unpublished); *State v. Henderson*, 192 Wn. App. 1042 (2016), *review denied,* 186 Wn.2d 1008, 380 P.3d 458 (2016) (Division I, unpublished).

[12] The *Schmeling* court also analyzed the defendant's case under traditional Eighth Amendment proportionality analysis, despite the absence of any argument or briefing on the issue. *Id.,* at 798-99; *see* Brief of Appellant Schmeling, available at

"*Graham* stands for the proposition that the categorical analysis applies to certain punishments involving juveniles." *Id.* This is true; however, nothing forecloses application of the *Graham* court's reasoning here.

The *Schmeling* court made a significant error, mischaracterizing *Graham's* assessment of the national consensus. *Id.*, at 800 n. 4. In *Graham*, the court counted 39 jurisdictions (including the federal government and the District of Columbia) authorizing life in prison without parole for juvenile offenders convicted of non-homicide offenses. *Graham*, 560 U.S. at 64.[13] Despite this, the court found a national consensus *against* the practice. *Id.*

Even fewer jurisdictions authorize felony sanctions for possession of residue in the absence of a culpable mental state. As outlined above, at least 22 jurisdictions prohibit the practice (compared to 13 jurisdictions prohibiting the imposition of the penalty at issue in *Graham*). Thus, the sentencing practice here is even rarer than that examined in *Graham.*

Furthermore, at least some jurisdictions have used *Graham's* categorical approach to analyze cases involving adults who were not

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http://www.courts.wa.gov/content/Briefs/A02/462184-Appellant's%20Brief.pdf (last accessed 7/8/16).

[13] At the time of the court's opinion, only 11 states had offenders actually serving life sentences for non-homicide crimes committed by juveniles. *Id.*, at 64. The court did not summarize any information establishing the reason.

sentenced to death. These include the Ninth and Tenth Circuits,[14] Illinois,[15] Iowa,[16] Kansas,[17] and Ohio.[18]

Each court examined the merits of the offender's categorical challenge. Although most offenders' categorical claims were rejected, none involved the kind of strong national consensus at issue here. Nor were the offenders able to make the arguments Mr. Barton can make regarding the second part of the *Graham* test.

This court should not follow Division II's decision in *Schmeling.* Instead, the court should apply *Graham's* categorical approach. As outlined above, RCW 69.50.4013 violates the Eighth amendment under the categorical approach because it does not require proof of a culpable mental state, and allows conviction for possession of drug residue even when the accused person is not at fault.

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[14] *United States v. Williams*, 636 F.3d 1229, 1233-34 (9th Cir. 2011), *but see United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2014); *United States v. Orona*, 724 F.3d 1297, 1300 (10th Cir. 2013).

[15] *People v. Brown*, 967 N.E.2d 1004, 1019 (Ill. App. Ct. 2012).

[16] *State v. Oliver*, 812 N.W.2d 636, 641-647 (Iowa 2012).

[17] *State v. Mossman*, 294 Kan. 901, 927-930, 281 P.3d 153, 170 (2012); *State v. Cameron*, 294 Kan. 884, 896-898, 281 P.3d 143 (2012); *State v. Frost*, 48 Kan. App. 2d 332, 334-342, 288 P.3d 151, 153 (2012); *State v. Williams*, 298 Kan. 1075, 1086-1090, 319 P.3d 528 (2014) (*Williams* II); *State v. Reed*, 50 Kan. App. 2d 1133, 1137-1144, 336 P.3d 912 (2014) (Reed I); *State v. Marion*, 50 Kan. App. 2d 802, 814-816, 333 P.3d 194 (2014); *State v. Reed*, 51 Kan. App. 2d 107, 109-115, 341 P.3d 616 (2015) (Reed II).

[18] *State v. Blankenship*, 145 Ohio St. 3d 221, 225-228, 48 N.E.3d 516 (2015).

The *Schmeling* court also failed to articulate a framework for analyzing due process challenges to strict liability crimes. *Schmeling*, 191 Wn.App. 801-02. Instead, *Schmeling* noted that the Supreme Court has not "express[ed] any concerns... that allowing a conviction for the possession of a controlled substance without showing intent or knowledge somehow was improper." *Id.*, at 802 (citing *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004); *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994); and *Cleppe, supra*).

But the Supreme Court did not decide a due process challenge in any of the cited cases.[19] Because the due process issue was not properly before the court in *Bradshaw*, *Staley*, or *Cleppe*, the Court's silence is hardly surprising and cannot be considered controlling.

For the reasons outlined above, RCW 69.50.4013 violates due process when applied to possession of residue. *Wulff*, 758 F.2d at 1125. The court must either invalidate the statute or recognize a non-statutory element. Mr. Barton's conviction must be reversed and his case dismissed with prejudice. *Id.*

[19] In *Bradshaw*, the court declined to address the appellants' due process challenge because they failed to adequately brief their arguments. *Bradshaw*, 152 Wn.2d at 539.

II. THE COURT'S "REASONABLE DOUBT" INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH" IN VIOLATION OF MR. BARTON'S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn.App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 17.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id*. at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 17. This violated Mr. Barton constitutional right to a jury trial. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. It also violated his right to due process. U.S. Const. Amend. XIV; Wash. Const. art. I, §3.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The

problem here is greater than that presented in *Emery.* In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 17. Jurors were obligated to follow the instruction.

Divisions I and II have rejected a challenge to this language. *State v. Kinzle*, 181 Wn.App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn.App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, 194 Wn. App. 900, 901-903, 378 P.3d 270, *review denied*, 186 Wn.2d 1026, 385 P.3d 119 (2016).[20]

Division III should not follow these decisions.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I's position.[21]

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was

[20] This court has also rejected a similar challenge in unpublished decisions. *See, e.g., Muse, supra.*

[21] Although the *Jenson* court adopted *Fedorov's* reasoning, it did not cite to *Bennett* in its summary of *Fedorov. Jenson,* 194 Wn.App. at 901-903.

not asked to address any flaws in WPIC 4.01.[22] *Id.* The *Bennett* court did not purport to approve WPIC 4.01 against all future constitutional challenges.

The *Fedorov* and *Jenson* courts also relied on *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). In *Pirtle,* as in *Bennett,* the defendant favored the "truth of the charge" language. *Id.,* at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.,* at 656.[23] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. Division III should not follow Divisions I and II.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett,* 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id*.

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[22] The *Bennett* court upheld the *Castle* instruction but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.,* at 318.

[23] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.,* at 656.

Improper instruction on the reasonable doubt standard is structural error.[24] *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Barton his constitutional right to a jury trial.

Mr. Barton's conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

III. THE SENTENCING COURT ERRED BY INCLUDING MR. BARTON'S ELUDING CONVICTION IN HIS OFFENDER SCORE.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

[24] RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

A conviction may "wash out" of the offender score. RCW 9.94A.525(2). Prior convictions for class C felonies are not included in an offender score if the offender spent five consecutive years in the community without committing "any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c).

Here, the sentencing court listed four prior adult felonies in Mr. Barton's criminal history. CP 50. One prior conviction was for attempting to elude, entered in May of 2000. CP 50. The court did not find that Mr. Barton committed any crimes between that date and 2015. CP 50.

Under these circumstances, the eluding charge should have washed out. RCW 9.94A.525(2)(c). The sentencing court erred by including the conviction in Mr. Barton's offender score and sentencing him with an offender score of four.[25] *Id.* The sentence must be vacated, and the case remanded for a new sentencing hearing.

[25] Although defense counsel agreed with the offender score calculation, this stipulation is not binding. *Worden v. Smith*, 178 Wn. App. 309, 327, 314 P.3d 1125 (2013) ("A stipulation by parties to the law does not bind a trial court or this court") (citing *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010).

CONCLUSION

For the foregoing reasons, Mr. Barton's convictions must be reversed. The possession charge must be dismissed, and the remaining charges remanded for a new trial. In the alternative, Mr. Barton's felony sentence must be vacated, and the case remanded for a new sentencing hearing.

Respectfully submitted on January 31, 2018,

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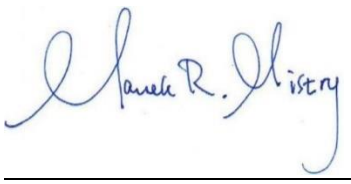

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Ferry County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 31, 2018.

Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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